George v. *Tompson's Trustee* (1) is mentioned in a foot-note at page 335 of *Williams* on Bankruptcy as one of the types of cases to which the new discretionary relief would seem to be applicable. In the present case, however, there is no evidence whatsoever of any species of imposition having been practised by the debtor upon the respondents as execution creditors, whereby they were unfairly delayed and deprived of their rights. Nor is there an iota of evidence that they were otherwise unfairly kept out of their money. The money was in court all the time, and if they were not diligent enough to take steps to have it paid out to them earlier they have only themselves to blame. In the circumstances I feel that it would be wrong for this court to exercise any discretion in favour of the respondents.

For the reasons I have stated I would make the declaration asked for on the motion and an order that the respondents do pay to the Official Assignee the money received by them. They must also pay the costs of these proceedings in proportion to the amounts received by them.

Motion granted.

Solicitors: *Shearn, Delamore & Co.; Gibb & Co.*

MERCANTILE BANK LTD., IPOH v. YOON SIEW KANG

[F.C. (Ong Hock Thye C.J. (Malaya), Suffian F.J. and Abdul Aziz J.) January 27, 1969]

[Ipoh — Federal Court Civil Appeal No. X.80 of 1967]

Bills of Exchange — Cheque — Dishonoured cheque — Holder in due course — Notice of defect in title of person negotiating it — Liability of drawer — Bills of Exchange Ordinance, 1949, ss. 29, 30, 31, 38 & 73.

This was an appeal against the decision of MacIntyre J. ([1967] 2 M.L.J. 226). The appellants, who had granted overdraft facilities to a firm of stockbrokers, had among securities held by them, cheques drawn in favour of the firm by others, including six cheques drawn by the respondent. Subsequently these six cheques were negotiated to the appellants. When the cheques were dishonoured upon presentation, the appellants sued the respondent on the amount of the cheques. The learned trial judge dismissed the action on the ground that the appellants had not taken the cheques in good faith as they had notice of a defect in the title of the firm of stockbrokers and therefore their claim as holders in due course must fail. He held that the respondent had issued the cheques to help the firm to conceal from the appellants the true financial position of the firm, and that the cheques were issued without consideration; as the firm of stockbrokers could not have sued the respondent on them, the appellants who purchased the cheques from the firm, with notice of the defect, were not to be placed in a better position than the firm. On the question of notice, he held that if the appellants had probed into the matter they would have discovered that the cheques had been given to the firm for no consideration at all and if they had scrutinized the cheques, they would have found them apparently worthless as negotiable instruments because their dates had been altered.

Held, allowing the appeal: (1) the cheques were complete and regular on their face and although the dates on them had been altered, these as the learned trial judge found could only have been done by the respondent and the directors of the firm in pursuance of a conspiracy and therefore the respondent could not rely on them to avoid the cheques;

(2) on the facts the appellants took the cheques in good faith and for value, and had no notice of any defect in the title of the firm who negotiated them;

(3) the appellants were therefore entitled as holders in due course to recover the amount of the cheques.

Cases referred to:—

(1) *Sheffield* v. *London Joint Stock Bank* (1888), 13 App. Cas. 353.

(2) *London Joint Stock Bank* v. *Simmons* [1892] A.C. 201.

(3) *Swan* v. *The North British Australasian Company* (1863), 159 E.R. 73; 2 H. & C. 175.

(4) *Jones* v. *Gordon* (1877), 2 App. Cas. 616.

(5) *Manchester Trust* v. *Furness* [1895] 2 Q.B. 539.

(6) *Baker* v. *Barclays Bank Ltd.* [1955] 2 All E.R. 571.

The following cases were also cited in argument: *Lloyds Bank Ltd.* v. *Swiss Bankverein* 108 L.T. 143, *Arab Bank Ltd.* v. *Ross* [1952] 1 All E.R. 709, [1952] 2 Q.B. 217, *A.E.G. Carapiet* v. *A.Y. Dorderian* A.I.R. 1961 Cal. 359, 362, *Browne* v. *Dunn* (1894), 6 The Reports 67, H.L., *V. Kondiah* v. *C.P. Pulliah* A.I.R. 1960 Andhra Pradesh 121.

FEDERAL COURT.

G.S. Hill (*N.T. Rajah* with him) for the appellants.

N. Sharma for the respondent.

Cur. Adv. Vult.

Suffian F.J.: MacPhail & Co., a firm of stockbrokers now in liquidation, had overdraft facilities from the Ipoh branch of the Mercantile Bank Ltd., the plaintiff in the lower court and the appellant here. Among other things the bank held as securities cheques drawn in favour of MacPhail by others, including six cheques amounting to $72,591 drawn by Yoon Siew Kang, a remisier working for MacPhail, the defendant in the lower court and the respondent here, and when Mr. Braine, the bank manager, thought MacPhail were sinking, he got one of MacPhail's directors, to negotiate these six cheques to the bank. These cheques were dishonoured when presented and the bank sued the defendant for the amount. At the end of the trial which, by consent, proceeded on the basis that the bank was claiming as a holder in due course, the bank's claim was dismissed and the bank appeals to this court.

The question for decision is a simple one. These cheques being complete and regular on their face and the bank having taken them for

value, as found by the learned trial judge, did the bank take them in good faith without notice of any defect in MacPhail's title? If so, then its claim must succeed.

This appeal is unique in that Mr. Hill, on behalf of the bank, accepted *in toto* the judge's findings of fact and Mr. Sharma, on behalf of the defendant, also accepted them *in toto* except as to one matter which I shall mention later.

The facts are as follows. Following the excellent example of the learned trial judge, I shall, first, set out the business relationship that existed between the plaintiff and MacPhail and, secondly, that between MacPhail and the defendant prior to the issue of the six cheques.

MacPhail were long standing customers of the bank. In 1962 and early in 1963 to expand their business they obtained fluctuating overdraft facilities to the amount of $600,000, subject to the discretion of the local manager to increase this limit up to $800,000. The size of the overdraft alone indicates that MacPhail was a firm of some substance and repute. The terms of the fluctuating overdraft were set out in a letter, the contents of which may be summarised as follows. Four named gentlemen, three of them being directors of the firm, guaranteed in their personal capacity the overdraft in the sum of $250,000. Further, MacPhail were to deposit as security with the bank share scrips with transfer forms signed in blank by the vendors. This appears to be the usual manner in which transfer forms are delivered in order to facilitate direct transfers to third parties who purchase them. It would appear to be a common banking custom to allow overdrafts on the security of such share scrips. The advantage of this form of securities is that the bank could realise them by filling the blank transfer forms and selling the scrips in the open market. However, the share scrips deposited with the bank would be required by MacPhail in the ordinary course of business for delivery to their clients or for resale at their request. To enable MacPhail to do this, share scrips to the value of $200,000 were to be released to them each morning, to be returned to the bank at the close of business each day. If, from among the share scrips released, MacPhail had to part with any scrip in the course of the day's business, it was to be replaced by another scrip of equal value or by cash in lieu thereof. Scrips retained by the bank from the close of business until the following morning, when they were released to MacPhail, were termed "overnight securities".

Throughout the year 1964 MacPhail's business was falling and the directors resorted to depositing as security, not only share scrips of the kind mentioned above, but also share scrips loaned by friends and clients and cheques drawn in favour of MacPhail. These cheques were drawn by MacPhail's clients who had ordered or bought shares of MacPhail and this was known to the bank manager.

When forwarding the securities to the bank at the close of business each day, MacPhail submitted a return called an "overnight statement" stating the value of the shares and the cheques. On receipt of the securities and the overnight statement, an official of the bank prepared a report giving the bank's assessment of the overnight security position. The amount by which the securities fell short of the overdraft was referred to as a shortfall.

Such were MacPhail's affairs when on 15th January, 1965 Mr. Braine took over the management of the plaintiff bank at Ipoh. He found, to use his own words, a "perpetual shortfall" and called upon the directors to make good the shortfall.

I shall now set out the business relationship that existed between MacPhail and the defendant. In April, 1961, the defendant, a clerk with the Southern Kinta Consolidated Ltd., began part-time work for MacPhail as a remisier, that is, a canvasser for business and by way of emolument he was paid half of the brokerage fees received by MacPhail in respect of business introduced by him. In April of the following year, at MacPhail's request, he deposited with MacPhail a sum of $5,300 by way of security to cover the risk of loss which may be occasioned by the failure of clients introduced by him to fulfil their contractual obligations. Later, in 1964 he agreed to increase the security deposit to $10,000 by monthly contributions amounting to 10% of his brokerage fee earned each month.

The defendant is personally related to MacPhail's directors. The learned trial judge rightly said that this was an important fact to be remembered because the control and management of MacPhail in 1964 and 1965 were in the hands of relatives who ran the business as a family concern. The two active directors, namely, Chan Loo Sim (D.W.7) and Chan Kum Yoong (D.W.9) are father and son. The chief clerk, Kwan Kee Yew, is the son's father-in-law and the son's wife was also a member of the staff.

When, therefore, in the early part of 1965, Mr. Braine demanded the shortfall to be made good, the financial affairs of the company reached a crisis. The only alternative left, short of providing personal guarantees by sureties acceptable to the plaintiff, was to make good the shortfall by depositing cheques drawn by third parties and that was exactly

what was done. Between the 4th and the 31st of March, 1965, the amounts secured by such cheques ranged from $172,000 to $185,000.

On the evening of 30th March, 1965, the shortfall amounted to $40,797. Thereupon Mr. Braine decided to act; on the morning of 31st March he released the share scrips deposited as overnight securities but not the cheques. Among these cheques were six cheques for $72,591 drawn in favour of MacPhail by the defendant, the cheques that are the subject of this dispute. By the evening of 1st April the shortfall had risen to about $70,000 and so even the release of overnight share scrips was stopped except on payment of their market value. One of MacPhail's directors gave Mr. Braine an assurance that a further guarantee would be available from a gentleman in Hong Kong. On the evening of 7th April Mr. Braine received information of the refusal of this gentleman to give the guarantee. Consequently on 8th April Mr. Braine called in the overdraft.

However, before the overdraft was called in, the six cheques in question had been indorsed by Mr. Chan Kum Yoong (D.W.9), a director of MacPhail, at the request of Mr. Braine between 31st March and 5th April in Mr. Braine's office. MacPhail's official chop was brought to the bank at the request of Mr. Braine, who then himself affixed the chop on the cheques. Mr. Braine then had the words "Pay to the Order of Mercantile Bank Ltd." typed on the back of the cheques. The cheques were presented for payment, but were dishonoured because the drawer's signature was irregular.

The defendant denied liability on the following grounds, namely:—

(1) that the plaintiff was aware that, under an agreement between MacPhail and the defendant, the six cheques were not intended to be presented for payment except under a specified contingency which had not arisen at the time of the indorsement or subsequently and the plaintiff had therefore not acquired any property in the cheques. Under the alleged agreement, when a client introduced by the defendant ordered shares, the defendant gave MacPhail his personal cheque to hold in order to cover the risk they ran of the client not paying for the shares. The arrangement was that, when the defendant collected the amount due from the client and paid it to MacPhail, the defendant's cheque would be returned to him. MacPhail was was not authorized to present it for payment; they could do so only if the client defaulted. It is said that the clients in respect of whose orders these six cheques were security did not complete their purchase and therefore MacPhail had no authority to negotiate them to the plaintiff bank;

(2) that the bank was not a holder in due course as the cheques had not been obtained in good faith or for value;

(3) that the cheques were void as the dates on each of them had been altered without the knowledge and consent of the defendant;

(4) that the cheques were presented for payment in breach of faith and in circumstances amounting to fraud;

(5) that the bank, having obtained judgment against MacPhail in Ipoh High Court Civil Suit No. 125 of 1965 on 3rd May, 1965, for $534,922.36 which included the sum of $72,591 payable on the six cheques, is precluded by law from suing the defendant for the same amount; and

(6) alternatively, the action must fail because the bank, in presenting the six cheques for payment, acted only as an agent for MacPhail without any consideration passing between the plaintiff and MacPhail in respect of the said cheques.

The learned trial judge found as follows. When MacPhail was in difficulties the defendant, being a relative, was willing to help MacPhail by issuing the six cheques to conceal from the bank MacPhail's true financial position. These cheques were issued without any consideration. The defendant acted dishonestly and it is not true that the cheques had been issued to cover any risk that MacPhail might run in respect of orders placed by clients. A letter D.13 purporting to have been written on 14th March, 1965 (i.e., about three weeks before MacPhail's overdraft was called in) by MacPhail to the defendant acknowledging the alleged arrangement between MacPhail and the defendant regarding these six cheques was branded by the learned trial judge as a faked document. Because of lack of consideration for the six cheques MacPhail could not have sued the defendant on them. The bank was a subsequent holder from MacPhail, the bank was a purchaser for value (it took the cheques to cover an antecedent debt) but with notice and, as it had notice, it cannot be placed in a better position than MacPhail. Therefore the learned trial judge dismissed the bank's claim.

As regards notice, the learned trial judge held that Mr. Braine acted honestly, but he appeared to have acted hastily, probably because he was aware of the impending crash of MacPhail and there had been a wilful blindness and absence of enquiry on his part in accepting the cheques. Mr. Braine knew that the cheques had been given to MacPhail by clients for the purchase of shares, but he did not enquire or care to enquire (as he was required by the case of *Sheffield* v. *London Joint Stock Bank* [1]) whether consideration had passed by the purchase and delivery of the shares and in fact it had been so passed. Had Mr. Braine probed into the matter, he would have discovered that the cheques had been given by the defendant to MacPhail for no consideration at all and if he had taken the trouble to scrutinize the cheques, he would have found them apparently worthless as negotiable instruments because their dates had been altered.

The only finding of fact by the learned trial judge which was attacked before us was as

regards the alteration of the dates. The attack was made by Mr. Sharma for the defendant. The defendant admitted that the dates had been altered, but he and the directors of MacPhail denied any knowledge of the alteration, the implication of their evidence being that the alterations were made after the cheques had been indorsed and handed over to the plaintiff. As to this, the judge found that the plaintiff could not have had any motive for destroying the securities by altering the dates and that the only parties who would have been interested in doing so were the defendant and/or the directors of MacPhail in furtherance of a conspiracy. I have scrutinized the evidence and with great respect I agree with the learned trial judge

In view of his finding that the bank had not taken the cheques in good faith as it had notice of a defect in MacPhail's title and therefore its claim as a holder in due course must fail, the judge did not consider the question whether or not the bank was barred by law from maintaining its action by virtue of the judgment obtained by it in Ipoh High Court Civil Suit No. 125 of 1965 against MacPhail.

Mr. Hill for the appellant-bank, while accepting the judge's finding of fact *in toto*, criticized the judgment as follows. He said that the learned trial judge was wrong in his interpretation of *Sheffield's case* [1] and that the doctrine of constructive notice should not be introduced into the law of commercial transactions and in particular into the law of negotiable instruments. It is wrong to say that, where the holder of negotiable securities otherwise *bona fide* and for value takes from a person whom he knows or suspects to have a merely limited interest, he acquires no larger interest than he from whom he has taken. It is wrong to say that, where the original holder could not have successfully maintained an action on the cheques, then the subsequent holder who is a purchaser for value with notice cannot be placed in a better position.

Secondly, Mr. Hill argued that the learned trial judge was wrong in regarding as material the fact that the plaintiff's manager, when permitting MacPhail to draw upon the overdraft account on the security of postdated cheques, took upon himself the risk of doing something in excess of the terms offered by the plaintiff's head office and therefore that he should have taken every step possible to satisfy himself of the financial standing of the drawer of the cheques and as to whether they were taken by MacPhail for value or not and in holding that there was any wilful blindness and absence of enquiry on the manager's part in accepting the cheques.

Thirdly, Mr. Hill submitted that the learned trial judge was wrong in failing to hold that, even if MacPhail could not have successfully maintained an action against the defendant on the cheques, the plaintiff was nevertheless a holder thereof in due course as defined in section 29 of the Bills of Exchange Ordinance.

Finally, Mr. Hill submitted that, having regard to the other findings made in the plaintiff's favour and since the plaintiff is not barred by law from maintaining an action by virtue of the judgment obtained by the plaintiff in Ipoh High Court Civil Suit No. 125 of 1965 against MacPhail, the learned trial judge should not have dismissed the plaintiff's claim.

I now turn to the law. The law applicable is to be found in the Bills of Exchange Ordinance No. 75 of 1949.

Each of these cheques is a bill of exchange, see section 73 of the Ordinance.

Section 31 provides:—

"(1) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

(2) A bill payable to bearer is negotiated by delivery.

(3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery."

As already stated, the bank's claim by consent proceeded on the basis that it was a holder in due course of these cheques.

Section 38 of the Ordinance sets out the rights of a holder and in particular that of a holder in due course as follows:—

"The rights and powers of the holder of a bill are as follows:—

(a) he may sue on the bill in his own name;

(b) where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill;

(c) where his title is defective (i) if he negotiates the bill to a holder in due course, that holder obtains a good an dcomplete title to the bill. . . . ."

Section 29 defines a holder in due course as follows:—

"(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:—

(a) that he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact;

(b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him, he had no notice of any defect in the title of the person who negotiated it.

(2) In particular the title of a person who negotiates a bill is defective within the meaning of this

Ordinance when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

Section 90 provides:—

"A thing is deemed to be done in good faith, within the meaning of this Ordinance, where it is in fact done honestly whether it is done negligently or not."

Section 27(1)(b) provides:—

"Valuable consideration for a bill may be constituted by . . . . any antecedent debt or liability . . . ."

Section 64 provides:—

"(1) Where a bill . . . . is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised or assented to the alteration . . .

(2) In particular the following alterations are material, namely, any alteration of the date . . . ."

Section 30 provides:—

"(1) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.

(2) Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the . . . . issue, or subsequent negotiation of the bill is affected with fraud . . . . the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud . . . ., value has in good faith been given for the bill."

It is to be noted that to succeed the plaintiff must establish four ingredients:—

(a) these cheques were complete and regular on their face;

(b) he took them in good faith;

(c) he took them for value; and

(d) at the time the cheques were negotiated to him he had no notice of any defect in the title of MacPhail who negotiated them.

As regards ingredient (a), the learned trial judge found that the alteration of the dates on the cheques was deliberately made to render them void as negotiable instruments, the bank had no interest in making these alterations and that the only parties who had an interest in mutilating the securities were the defendant and/or the directors of MacPhail in furtherance of a conspiracy. As I have already said, I respectfully agree with the judge's finding on this.

As for ingredient (c), the learned trial judge found that after the cheques had been indorsed to the bank by D.W.9 they were accepted by the bank in respect of an antecedent debt and that that was valuable consideration within the meaning of section 27(b). With respect I agree.

Ingredients (b) and (d) are inter-linked. Did MacPhail negotiate these cheques to the bank in breach of faith or under such circumstances as amounted to a fraud? If so, MacPhail's title was defective. Did Mr. Braine at the time when the cheques were negotiated to the bank have notice of any defect in the title of MacPhail who negotiated them? Did Mr. Braine take these cheques honestly? Was he negligent in not probing? If he was negligent, was his negligence material?

There is no difficulty concerning ingredients (a) and (c); the only difficulty concerns the meaning of "good faith" and "notice of MacPhail's defect in title".

The above-quoted provisions of the Ordinance are identical with the corresponding provisions of the English Bills of Exchange Act, 1882. I now turn to the English decisions.

In *Sheffield's case* [1] Lord Sheffield gave Easton certificates of railway stock with transfers thereof executed by him in blank and other negotiable securities to enable Easton to raise £26,000. Easton borrowed £26,000 from Mosley, a moneylender in London, on the strength of these transfers and securities. Mosley deposited the transfers and securities, as security for large loan accounts between him and some banks, the blanks in the transfers of stocks being filled up with the names of nominees of the banks. The banks in so dealing, either actually knew, or had reason to believe, that the securities did or might belong not to Mosley but to his customers. Mosley having become bankrupt, the banks sold some of Lord Sheffield's securities and claimed to hold the proceeds and the unsold remainder as security for all the debt due from Mosley to them. It was held by the House of Lords, reversing the Court of Appeal, that they were not purchasers for value without notice, but ought to have enquired into the extent of Mosley's authority and, upon payment to the banks of the money advanced by Mosley to Easton, Lord Sheffield was entitled to the value of such securities as had been sold by the banks and to redeem the remainder.

Lord Halsbury L.C. was one of the judges present when the decision was made. Four years later in *London Joint Stock Bank* v. *Simmons* [2] he explained *Sheffield* [1] as follows:—

"The only question of law decided in *Lord Sheffield's case* [1] was that a purchaser, even for value, cannot insist on his purchase if he *knows* that the person from whom he purchases has no right to sell, — . . .

. . . [the bank] had actual knowledge that the person pledging [the securities] had only a limited authority to raise money on them (page 208)."

Lord Herschell said at page 219:—

"I will state what I understand to be the grounds of the judgment [in *Sheffield's* case] (1). The person from whom the bank took the securities in that case was himself a pledgee of them; as such he had an undoubted right to repledge them. He, in fact, repledged them as security for a sum exceeding that for which he held them in pledge. . . . . The question which arose was whether the bank could insist on retaining them for the larger sum, or whether the owner could redeem them on paying to the bank the amount for which they were originally pledged. The noble and learned Lords came to the conclusion, as I understand, that the bank *knew* that Mosley held the securities in question as pledgee only in respect of an advance made upon them, or that if they did not actually know this, what they knew of the nature of his business as a moneylender, and the information which they derived from their transactions with him, made it almost certain that this was the case. That knowing or having every reason to believe that his title was only that of pledgee *for a limited advance*, they knew, or had reason to believe that in pledging them to the bank for his entire indebtedness he was exceeding any authority he had to deal with them. That under these circumstances it was incumbent upon them to make some further investigation if they wished to insist upon their security to the full extent. That the circumstances, as it was said, put them upon inquiry. I gather that their Lordships must further have been of opinion that if the bank had made reasonable inquiries they would have ascertained the facts and have thus had distinct knowledge of circumstances which would have made it appear that they could not hold the securities for anything beyond the advance in respect of which Mosley held them, and that in offering them as security for a greater sum Mosley was exceeding any authority he had to deal with them. My reason for inferring that their Lordships entertained this opinion is that I apprehend that when it is said that a person is put on inquiry the result in point of law is that he is deemed to know the facts which he would have ascertained if he had made inquiry. He cannot better his position by abstaining from so doing. On the other hand, his position cannot be worse than it would have been had he made inquiry and been in possession of the result of it. Supposing Mosley had been questioned as to his right to deal with the securities, and had given a satisfactory assurance, and there had been no reason to doubt his honesty, I cannot but think that the decision of this House would have been different."

It is to be noted that in *Sheffield's case* (1) the banks knew of the nature of Mosley's business as a moneylender, they *knew or had every reason to believe* that Mosley's title was only that of pledgee for a *limited* advance and they knew or had reason to believe that in pledging them to the bank for his entire indebtedness he was *exceeding* any authority he had to deal with them.

In the instant case the plaintiff bank was dealing not with a moneylender whose method of business was of the kind in *Sheffield's case.* (1) The plaintiff bank was dealing with a firm of stockbrokers. In *Simmons' case* (2) the facts were that a broker, in fraud of the owner, pledged negotiable instruments together with other instruments belonging to other persons with the bank as a security for an advance. The bank did not know whether the instruments belonged to the broker or other persons, or whether the broker had any authority to deal with them and made no inquiries. The broker having absconded, the bank realised the securities. It was held by the House of Lords, reversing the Court of Appeal, that there being as a matter of fact no circumstances to create suspicion, the bank was entitled to retain and realise the securities, having taken negotiable instruments for value and in good faith.

On the duty of bank managers, Lord Herschell said at page 223:—

"It is easy enough to make an elaborate presentation after the event of the speculations with which the bank managers might have occupied themselves in reference to the capacity in which the broker who offered the bonds as security for an advance held them. I think however, they were not bound to occupy their minds with any such speculations. I apprehend that when a person whose honesty there is no reason to doubt offers negotiable securities to a banker or any other person, the only consideration likely to engage his attention is, whether the security is sufficient to justify the advance required. And I do not think the law lays upon him the obligation of making any inquiry into the title of the person whom he finds in possession of them; . . . ."

In *Swan* v. *The North British Australasian Company* (3) Byles J. said at page 77:—

"The object of the law merchant, as to bills . . . . is to secure their circulation as money; therefore honest acquisition confers title. To this despotic but necessary principle the ordinary rules of the common law are made to bend. The misapplication of a genuine signature written across a slip of stamped paper (which transaction being a forgery would in ordinary cases convey no title) may give a good title to any sum fraudulently inscribed [on the paper] . . . . Negligence, in the maker of an instrument payable to bearer, makes no difference in his liability to an honest holder for value; the instrument may be lost by the maker without his negligence or stolen from him, still he must pay. The negligence of the holder, on the other hand, makes no difference in his title. However gross the holder's negligence, if it stops short of fraud he has a title."

In *Jones* v. *Gordon* (4) Lord Blackburn said:—

"I should be extremely sorry to say anything which should cast doubt upon the principle that a bill of exchange, ..., is negotiable to the fullest extent of its kind. The negotiation of these bills of exchange, in a mercantile country like this, is of great value. . . . if it can be shewn that a bill of exchange in its inception was not a good bill of exchange, and that originally it was obtained by fraud, yet a person who has taken it *bona fide* and for value is entitled to sue upon it . . . . even though it is shewn that there was an infirmity or vice in the title of some of those persons who passed it, unless the knowledge of that vice is brought home to him who took it (page 627).

. . if value be given for a bill of exchange, it is not enough to shew that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong, when there were circumstances which might have led a man to suspect that. All these are matters which tend to shew that there was dishonesty in not doing it but they do not in themselves make a defence to an action upon a bill of exchange. I take it that

in order to make such a defence, ..., it is necessary to shew that the person who gave value for the bill, ..., was affected with notice that there was something wrong about it when he took it. I do not think it is necessary that he should have notice of what the particular wrong was. If a man, knowing that a bill was in the hands of a person who had no right to it, should happen to think that the man perhaps had stolen it, when if he had known the real truth he would have found, not that the man had stolen it, but that he had obtained it by false pretences, I think that would not make any difference if he knew that there was something wrong about it and took it. If he takes it in that way he takes it at his peril.

But then I think that such evidence of carelessness or blindness as I have referred to may with other evidence be good evidence upon the question, ..., whether he did know that there was something wrong in it. If he was . . . . honestly blundering and careless, and so took a bill of exchange or a bank-note when he ought not to have taken it, still he would be entitled to recover. But if the facts and circumstances are such that [the court] came to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind — I suspect there is something wrong, and if I asked questions and make further inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover — I think that is dishonesty." (Pages 628 and 629).

In *Simmons' case* [2] Lord Herschell said at page 223:—

". . . . if there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer [negotiable instruments] is justified in entering into the contemplated transaction . . . . the existence of such suspicion or doubt will be inconsistent with good faith. And if no inquiry were made, or if on inquiry the doubt were not removed and the suspicion dissipated, ... good faith was wanting in a person thus acting."

In an earlier passage Lord Herschell said at page 221:—

". . . . the tribunal must investigate the facts for itself and determine whether those who claim to hold a negotiable instrument have made out that they took it in good faith and for value. One word I would say upon the question of notice, and being put upon inquiry. I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry."

Three years later Lindley J. in *Manchester Trust* v. *Furness* [5] said at page 545:—

". . . . as regards the extension of the equitable doctrines of constructive notice to commercial transactions, the courts, have always set their faces resolutely against it. The equitable doctrines of constructive notice are common enough in dealing with land and estates, ...; but there have been repeated protests against the introduction into commercial transactions of anything like an extension of these doctrines, and the protest is founded on perfect good sense. In dealing with estates in land, title is everything, and it can be leisurely investigated; in commercial transactions, possession is everything; and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions, we should be doing infinite mischief and paralyzing the trade of the country."

In a recent case decided 60 years later, *Baker* v. *Barclays Bank, Ltd.* [6] Devlin J. as he then was, said at page 581:—

". . . . 'notice' in section 29(1)(b) means *actual* notice — . . . ."

But in view of the other authorities, this statement of the law appears to go too far.

From the above authorities I extract the following principles for the determination of this dispute. Negligence on the part of the defendant in letting these cheques loose on the public would make no difference to his liability to an honest holder for value. Even if it is true (as found by the judge) that there was no consideration for these cheques which were handed over to MacPhail simply to deceive the bank with no intention that they be used or negotiated by MacPhail and that they were negotiated by MacPhail contrary to the intention of the conspirators, still the defendant would be liable — provided the bank took them for value in good faith without notice of MacPhail's defect in title. If Mr Braine's gross negligence had prevented him from acquiring such notice, the defendant would still be liable. Equally Mr. Braine's carelessness or foolishness in not suspecting that there was something wrong about these cheques would not in any way affect the defendant's liability. But if there were circumstances in the transactions that might have led Mr. Braine to suspect that there was something wrong and yet because he was honestly blundering and careless he took the cheques without further inquiry, the bank would still be entitled to recover. On the other hand, if he was not honestly blundering and careless but thought in his own secret mind there was something wrong and if he asked questions and made further inquiry it would no longer be his suspecting it but his knowing it, then that would be dishonesty and the bank would not be able to recover. If he had shut his eyes to the facts presented to him and put his suspicions aside without further inquiry he had not acted in good faith. The existence of suspicion or doubt is inconsistent with good faith.

Mr. Braine was told and thought that these cheques had been given to MacPhail in payment for shares ordered. In case of shares delivered, any cheques endorsed by MacPhail to the bank would pass a good title to the bank and there is no difficulty. But in case of shares yet to be delivered, if the cheques

were endorsed by MacPhail to the bank and it later transpired that the shares were never delivered because, for example, the order had been cancelled and at the time of the endorsement Mr. Braine knew of the arrangement regarding these cheques between MacPhail and the drawers — the bank cannot sue on these cheques; because MacPhail had a defect in their title, the bank had notice of it and so the bank had not taken the cheques in good faith.

But the instant case is complicated by the fact that the truth is not, as the bank thought, that these were clients' cheques for shares ordered. The truth was that these cheques were given by the defendant to MacPhail for no consideration at all, the amounts in them were fictitious and the cheques were given fraudulently as part of a conspiracy to conceal from the bank MacPhail's true financial position and it was never the intention of the conspirators that they should ever be negotiated or cashed. In negotiating them MacPhail undoubtedly acted in breach of faith and therefore MacPhail's title in the cheques was defective. The bank did not, however, know of the dishonest arrangement and purpose of the two. If Mr. Braine had inquired and been told the truth, the bank would have been fixed with knowledge of the defect in MacPhail's title and cannot sue on the cheques. But he did not inquire. Had he inquired, would he have been told the truth? I doubt it, because even right to the day of the trial the defendant and the two directors of MacPhail persisted in saying that the cheques had been given to MacPhail as security for shares ordered by clients introduced by the defendant. Should the bank be then fixed with knowledge to that effect when that was not the truth? I do not think so. The defendant and the two directors never admitted the conspiracy to the learned trial judge and would never have admitted the conspiracy to Mr. Braine had Mr. Braine inquired. Should the bank then be deemed to have constructive knowledge of a fact which the conspirators concerned were careful to conceal and did conceal from Mr. Braine? I think that it would be unjust and inequitable to do so, for to do so would enable the defendant to benefit from his own fraud. In the circumstances, in my judgment the bank cannot be said not to have taken these cheques in good faith and honestly and in my judgment, the bank should recover.

Finally I deal with the point made by the defendant that the bank had already obtained judgment against MacPhail for the amount in these self-same cheques. Mr. Braine admitted this, but the liquidators said in evidence that MacPhail's total liability amounted to $1,000,195.07, their realisable assets to $88,062.57, the estimated cost of liquidation was $20,000, no dividend had been declared and no dividend was likely to be declared. Because of sections 55 and 57 which provide:—

> "55. (1) The drawer of a bill by drawing it —
>
> (a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured, he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;
>
> (b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.
>
> (2) The indorser of a bill by indorsing it —
>
> (a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;
>
> (b) is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;
>
> (c) . . . . . ."
>
> "57. Where a bill is dishonoured, the measure of damages, which shall be deemed to be a liquidated amount, shall be as follows —
>
> (a) the holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser —
>
> (i) the amount of the bill;
>
> (ii) interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case; . . . ."

I am of the opinion that it is lawful for the bank to obtain judgment for the amount in the six cheques against both the defendant as drawer and MacPhail as indorser, provided that it does not receive payment twice.

In the circumstances I would allow this appeal with costs here and in the court below.

Ong Hock Thye C.J. (Malaya) and **Abdul Aziz J.** concurred.

Appeal allowed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; N. Sharma.*

LAI KUIT SEONG v. PUBLIC PROSECUTOR

[F.C. (Ong Hock Thye C.J. (Malaya), Suffian F.J. and Abdul Aziz J.) January 27, 1969]

[Ipoh—Federal Court Criminal Reference No. X3 of 1968]

Road Traffic — Dangerous, reckless or careless driving — Onus of proof — Whether the doctrine of res ipsa loquitur applies in a criminal trial — Road Traffic Ordinance, 1958, ss. 34A, 35 & 36.

The question raised in this reference was whether the doctrine of *res ipsa loquitur* is available to the prosecution to enable it to discharge the onus of proof resting upon it in cases involving charges under section 34A or 35 or 36 of the Road Traffic Ordinance, 1958, if in the circumstances of the case the trial magistrate cannot properly find or infer from the evidence adduced the facts sustaining the relevant charges.

Held: the maxim *res ipsa loquitur* has no application in criminal cases.

Obiter: The doctrine of *res ipsa loquitur* arises only in connection with the tort of negligence and does not apply where the cause of the accident is known. Secondly, the *res* speaks because, and only because, where the accident stands unexplained, the known facts and circumstances, however meagre, may be such that want of reasonable care is safely attributable to the person but for whose negligence the accident could not have happened. In other words, the circumstances are eloquent testimony *per se* of negligence. Thirdly, and conversely, *res ipsa loquitur* cannot be relied on where the *res* is ambivalent. Fourthly, in criminal proceedings, where the heavier onus of proof rests on the prosecution and the facts proved must be sufficient to support the charge beyond reasonable doubt, the occasion can never arise where the facts require to be bolstered up by invocation of the doctrine.

[**Editorial Note:** The attention of the court did not appear to have been drawn to the case of *Ramasamy* v. *R.* [1955] M.L.J. 95 where Spenser Wilkinson J. held that it is wrong to apply the doctrine of *res ipsa loquitur* in criminal cases in which negligence must be positively proved.]

Cases referred to:—

(1) *Simpson* v. *London, Midland & Scottish Rly. Co.* [1931] A.C. 351, 357.

(2) *Mackinnon* v. *Miller* (1909), S.C. 373.

(3) *Qualcast (Wolverhampton) Ltd.* v. *Haynes* [1959] 2 W.L.R. 510, 515, 518.

(4) *Barkway* v. *South Wales Transport Co. Ltd.* [1950] 1 All E.R. 392, 395.

(5) *Doughty* v. *Turner Manufacturing Co. Ltd.* [1964] 2 W.L.R. 240, 248.

FEDERAL COURT.

P.P. Dharmananda for the applicant.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ong Hock Thye C.J. (Malaya): The question of law reserved for the decision of this court by the judge at Ipoh, under section 66 of the Courts of Judicature Act, 1964, was the sequel to an appeal from the magistrate's court at Taiping, and is as follows —

"Whether the doctrine of *res ipsa loquitur* is available to the prosecution to enable it to discharge the onus of proof resting upon it in cases involving charges under sections 34A or 35 or 36 of the Road Traffic Ordinance, 1958, if in the circumstances of the case the trial magistrate cannot properly find or infer from the evidence adduced the facts sustaining the relevant charges."

The reference was made on the application of counsel for the appellant but, with respect, I think it should not have been granted. The maxim *res ipsa loquitur* simply means that, in certain circumstances, one fact *per se* may afford sufficient *prima facie* evidence from which the inference of another fact may properly and reasonably be drawn, unless and until the contrary is shown.

In the instant case the appellant had been summoned on a charge of driving a motor-bus without due care and attention, contrary to section 36(a) and punishable under section 146 (1)(2) of the Road Traffic Ordinance, 1958. The prosecution based its case mainly, if not solely, on the fact that the vehicle came to grief some 66 yards after it had negotiated a sharp bend, where it was found by the investigating officer lying on its side near the drain. At the close of the prosecution the learned magistrate accepted counsel's submission that *res ipsa loquitur* had no application in criminal cases and on that ground dismissed the charge without calling on the defence. The public prosecutor appealed against this decision and his appeal was allowed on the facts, since a vehicle does not ordinarily overturn after taking any bend, sharp or otherwise. Counsel then applied for the question above set out to be referred.

In my view the phrasing of the question itself shows that the maxim seemed to have been misunderstood: "if, in the circumstances of the case, the trial magistrate cannot properly find or infer from the evidence adduced the facts sustaining the relevant charges", how can *res ipsa loquitur* be raised? The *res* must speak for itself. If it does not, the maxim means nothing at all and cannot be invoked to fill a gap or supply a missing link in the evidence. The answer, therefore, is implicit in the question itself. Before us both counsel were agreed — we think rightly — that the maxim has no application at all in criminal cases.

The judge, however, had taken great pains, out of deference to learned counsel, to refer to five of the cases cited to him. With respect, it was not at all necessary to do so since he found them quite irrelevant. In this connection I am reminded of what Viscount Dunedin said in *Simpson* v. *London, Midland & Scottish Rly. Co.*:—(1)

"It is no use trying to decide a case simply by looking at decided cases and then inquiring which case most resembles the present on the facts. Decided cases are only useful so far as they lay down principles, and then, to quote what I said myself in a case which I fear I shall often have to refer to (*Mackinnon* v.